

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
80175-s76H BY STEVE TINTZMAN)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the April 20, 1993, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit 80175-s76H by Steve Tintzman is denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.


If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as

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part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 20 day of May, 1993.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 24th day of May, 1993, as follows:

Steve Tintzman
386 Cooper Ln
Hamilton, MT 59840

Ronald T. Conklin
Reed V. McCaulley
1105 S. 1st
Hamilton, MT 59828

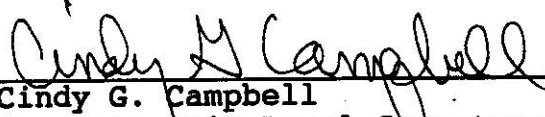
Bruce & Joan Chesebro
874 Willow Creek Rd
Corvallis, MT 59828

James N. & Joan I. Cox
836 Mason Ln
Corvallis, MT 59828

Fred J. & Joann C. Hosko
P.O. Box 428
Victor, MT 59875

Larry Schock
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806
(via electronic mail)

T.J. Reynolds, Interim Manager
Missoula Water Resources
Regional Office
1520 East Sixth Avenue
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR BENEFICIAL WATER USE PERMIT)	FOR
80175-s76H BY STEVE TINTZMAN)	DECISION

* * * * *

Pursuant to Mont. Code Ann. §§ 85-2-121 and 85-2-309 (1991), a hearing was held in the above matter on March 26, 1993, in Missoula, Montana, to determine whether a Permit to Appropriate Water based on the above application should be granted to Steve Tintzman under the criteria in Mont. Code Ann. § 85-2-311(1) and (4) (1991).

APPEARANCES

Applicant Steve Tintzman appeared at the hearing on his own behalf. Cheryl Tintzman, Applicant's spouse, appeared as witness in behalf of Applicant.

Objector Fred J. Hosko appeared at the hearing on his own behalf and as spokesman for Objector Joann C. Hosko.

Objectors James N. Cox and Joan I. Cox appeared at the hearing on their own behalf.

Objector Ronald T. Conklin appeared at the hearing on his own behalf and as spokesman for Objector Reed V. McCaulley. Doug Brown, area land owner and water right owner, appeared at the hearing as a witness in behalf of Objector Conklin.

Objectors Bruce Chesebro and Joan Chesebro appeared at the hearing on their own behalf. Richard Lavender, area land owner

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and water right owner, appeared at the hearing as a witness in behalf of Objectors Chesebro. Doug Brown also appeared at the hearing as a witness in behalf of Objectors Chesebro.

Larry Schock, Civil Engineering Specialist in the Missoula Water Resources Division Regional Office of the Department of Natural Resources and Conservation (Department), appeared as spokesperson for the Department.

EXHIBITS

Objector Conklin offered the following exhibits which were accepted into the record without objection.

Conklin's Exhibit 1 is a color photograph of most of the large existing pond on Charleys Gulch.

Conklin's Exhibit 2 is a color photograph of Applicant's former house. Partially visible in the left background is the existing large pond on Charleys Gulch. Partially visible on the right is the existing small pond adjacent to Applicant's house.

Conklin's Exhibit 3 is a color photograph of Applicant's former house and adjacent small pond.

Conklin's Exhibit 4 is a color photograph of the dike area of the large existing pond on Charleys Gulch.

Conklin's Exhibit 5 is a color photograph of the upstream portion of the large existing pond on Charleys Gulch.

Conklin's Exhibit 6 is a five-line advertisement clipped from page five of the Wednesday March 17, 1993, edition of the Hamilton, Montana, Ravalli Republic.

Conklin's Exhibit 7 is a portion of page ten of the March 11, 1993, edition of *Life & Times Press*. A seven-line advertisement has been circled in black ink and "\$36,900" written just above the advertisement in black ink.

Conklin's Exhibit 8 is a one page photocopy of the July 30, 1981, notarized statement of George Gates, ex-water commissioner on Willow Creek.

Larry Schock, for the Department, offered the following exhibit which was accepted into the record without objection.

Department's Exhibit 1 consists of six pages. The first two are a memorandum from Larry Schock dated March 25, 1993, on the subject "Earthen Embankment Dam." The following four sheets contain seven photocopied pages which are a copy of USDA Soil Conservation Service Technical Guide, Pond 378. Certain sections of the guide have been highlighted by Larry Schock.

The hearing record was kept open by the Hearing Examiner until April 9, 1993, for the sole purpose of allowing Applicant opportunity to submit further documentary evidence by April 2, 1993, regarding ownership of the proposed place of use and to allow Objectors opportunity to respond to whatever documents Applicant submitted. On April 1, 1993, the Department received materials from Applicant which were returned to him because not all of the materials had been served on all parties. On April 5, 1993, Applicant resubmitted a photocopy of a tax statement with a certificate of service indicating it had been served on all

parties on March 30, 1993. No responses were received. The tax statement is accepted into the record as Applicant's Exhibit 1.

Immediately prior to the hearing the parties were given the opportunity to review the Department's file on this application. No objection was expressed against any part of the file being made a part of the record. At the beginning of the hearing, the Hearing Examiner entered the Department's file into the record in its entirety.

Immediately prior to the hearing the parties were given the opportunity to review three documents:

- *Private Montana Fish Ponds*, by Joseph Urbani and Associates, Inc. for The Montana Department of Fish, Wildlife and Parks, draft dated January 1993 (twenty-six sheets, copied front and back).

- *New Appropriations Verification Policy*, Water Rights Bureau, Water Resources Division, Department of Natural Resources and Conservation, by Teresa McLaughlin, February 20, 1987, pages 141-144, and A64-A68 (seven sheets, copied front and back). Specifically Section IV. *Other Uses*, Part B. *Fish Purposes*, Part C. *Wildlife and Waterfowl*, and Part D. *Recreation Purposes*; and Appendix Section 3. *General Guidelines for Fish Ponds*.

- In the Matter of Application for Beneficial Water Use Permit 75737-s76H by Burns E. and Wilma B. Finlayson and Alan J. and Gayla W. Finlayson, Final Order, September 26, 1991 (eleven sheets, copied front and back).¹ (Hereinafter referred to as the Finlayson Order.)

At the beginning of the hearing the Hearing Examiner took official notice of these materials. No objection was expressed by any party.

¹ The Findings of Fact and Conclusions of Law contained in the August 30, 1991, Proposal for Decision are incorporated into the Final Order by reference. See Finlayson Final Order, page 1.

At the beginning of the hearing, the Hearing Examiner took official notice of records maintained by the Department on water rights in the vicinity of the proposed appropriation. No objection was expressed by any party.

Facts in this Proposal for Decision which have been derived from the noticed materials or records are identified as such.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 80175-s76H in the name of and signed by Steve Tintzman was filed with the Department on January 22, 1992, at 12:45 p.m. (Department's file)

2. Applicant proposes to appropriate 300 gallons per minute up to 18.4 acre-feet per year of water from Charleys Gulch by means of a dam in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, Township 6 North, Range 20 West, Ravalli County, Montana. The appropriation would be used for fish and wildlife purposes in and at a proposed on-stream reservoir in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, Township 6 North, Range 20 West, Ravalli County, Montana. The capacity of the reservoir would be 12 acre-feet. The period of appropriation would be January 1 through December 31 of each year. (Department's file)

3. Pertinent portions of the application were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the proposed source, on August 19, 1992. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be

interested in or affected by the application. (Department's file)

4. The Department received four timely objections filed against this application.

Ronald T. Conklin and Reed V. McCaulley objected contending the proposed appropriation would adversely affect their water rights and that there is no unappropriated water in Charleys Gulch citing the Department's conclusions in the Finlayson Order and alleging potential increases in ditch losses to substantiate the contentions.

Fred J. Hosko and Joann C. Hosko objected contending the proposed appropriation would adversely affect their water rights and that there is no unappropriated water in Charleys Gulch, citing the Department's conclusions in the Finlayson Order and statements in their own water rights claims to substantiate the contentions.

James N. Cox and Joan I. Cox objected contending there is no unappropriated water in Charleys Gulch, citing the Department's conclusions in the Finlayson Order and stating specific periods of shortage to substantiate the contention.

Bruce Chesebro and Joan Chesebro objected contending there is no unappropriated water in Charleys Gulch, citing the Department's conclusions in the Finlayson Order and stating their own inability to obtain their full entitlement to substantiate the contention. (Department's file)

5. Charleys Gulch is a small, natural-channel stream with year-round flows originating, at least in part, from the confluence of flows from many small springs. Charleys Gulch is a tributary to Willow Creek, joining Willow Creek approximately one-quarter mile downstream from the proposed point of diversion and place of use. (Department's file and testimony of Bruce Chesebro and Steve Tintzman)

6. All Objectors have filed statements of claim for water rights in the statewide adjudication, claiming water rights from Willow Creek or Charleys Gulch. All of the rights claim priority dates prior to July 1, 1973. Many of the rights are for year round stock watering use. Many others are for irrigation from as early as the beginning of March to as late as the beginning of November. There is no evidence in the record questioning the existence and extent of Objectors' water rights. (Department's file and Department's records)

7. During certain times of the year, much of the flow in Charleys Gulch is the result of return flows from irrigation on up-gradient agricultural lands. Such return flows are a seasonal phenomenon dependent upon the agricultural irrigation season and practices in the area. (Conklin's Exhibit 8, testimony of Bruce Chesebro, and generally recognized technical fact²)

8. Sometime between May 28 and June 14, 1992, Applicant measured the width, depth, and rate of water flowing in Charleys

² See Mont. Admin. R. 36.12.221(4) (1991).

Gulch. Larry Schock used these measurements to calculate the amount of flow Applicant had measured, which was 0.67 cubic feet per second, or 300 gallons per minute. The record contains no other measurements of the rate of water flowing in or volume of water discharged from Charleys Gulch. (Department's file)

9. During the irrigation season for many years, flows in Charleys Gulch have been inadequate to satisfy water rights. Shortages of water in Charleys Gulch have regularly occurred in July and August over the past 55 years. For twenty years Richard Lavender, Doug Brown, Objectors Chesebro, and Objectors Hosko have been reacting to chronic water shortages in Willow Creek from the beginning of May through the middle of September of each year by rotating among themselves the timing of their water use for irrigation. (Finlayson Order and testimony of Bruce Chesebro, Fred Hosko, and Doug Brown)

10. Each year the water commissioner on Willow Creek is hired, usually in July and August, because there is not enough flow in Willow Creek to satisfy all existing water rights, including the reach of Willow Creek below the confluence of Charleys Gulch. The commissioner does shut off the diversion works of junior water rights to provide water to seniors. Last year Objectors had to hire the water commissioner in May. When the commissioner started working, some water, but not their full entitlement, was made available to them. (Conklin's Exhibit 8 and testimony of Bruce Chesebro, Ronald Conklin, and Joan Cox)

11. Conclusion of Law 11 of the Finlayson Final Order issued September 26, 1991, by the Department concludes "there are no unappropriated waters in Charley's Gulch." This conclusion is based on the analysis of evidence submitted with regard to an application for permission to appropriate water from Charleys Gulch for irrigation during the period of April 30 through September 30. There have been no subsequent conclusions by the Department on water availability in Charleys Gulch. (Finlayson Order and Department's records)

12. At the hearing Applicant testified he was aware of the shortages experienced by Objectors and intended to divert water to fill the reservoir only during times when none of them were irrigating, particularly November, December, and January.
(Testimony of Steve Tintzman)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1991).

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled (see Findings of Fact 1, 2, 3, and 4); therefore, the matter is properly before the Hearing Examiner. See Mont. Code Ann. §§ 85-2-301, 302, 305, and 307 through 309 (1991).

3. The Department must issue a beneficial water use permit if the applicant proves by substantial credible evidence that the

following criteria set forth in Mont. Code Ann. § 85-2-311(1) (1991) are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. To meet the substantial credible evidence standard in Mont. Code Ann. § 85-2-311(1) (1991) the applicant must submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the Department, the U.S. Geological Survey, or the U.S. Soil Conservation Service and other specific field studies, demonstrating that the criteria are met. Mont. Code Ann. § 85-2-311(4) (1991).

5. Prior appropriators of waters of a stream gain the right to natural flows of all tributaries (see Findings of Fact 5, 6, and 7) in so far as the flows may be necessary to afford the amount of water to which they are entitled. See Loyning v.

Rankin, 118 Mont. 235, 165 P.2d 1006 (1946); Granite Ditch Co. v. Anderson, 204 Mont. 10, 662 P.2d 1312 (1983); Beaverhead Canal Co. v. Dillon Electric Light & Power Co., 34 Mont. 135, 85 P. 880 (1906).

6. From the first of May through the middle of September of every year the proposed appropriation would be under a constant call for water from prior appropriators. See Finding of Fact 9. Where a senior water right holder would have to call for water every time the senior wishes to divert water, there is an adverse effect to the senior. See In re Application 53498-s41S by Randal G. Ridgeway; In re Application 58432-s43A by Lester and Annabelle M. Frederick; see also In re Application G33710-41S by Floyd R. Blair.

7. For the period of time a source is routinely and annually under constant call or a water commissioner routinely and annually shuts off junior water rights to provide water for seniors, all water which may be physically present in the source is en route to satisfy the seniors and is appropriated, so long as the water would reach the seniors (see Finding of Fact 10). See In re Applications 74310-s76H by Unified Industries and 74311-s76H by City of Pinesdale; see also In re Application 70511-s76LJ by Winter Sports, Inc. Hence, there is no unappropriated water available in the source from the first of May through the middle of September (see Findings of Fact 9 and 10, and Conclusion of Law 6), and as to that period of time it is

concluded that the criterion set forth in Mont. Code Ann. § 85-2-311(1)(a) (1991) is not met.

8. A prior determination by the Department (see Finding of Fact 11) on the availability of unappropriated water in a source forms a presumption as to availability relative to any subsequent application. Nevertheless, a subsequent applicant or objector has the right to produce evidence or arguments to prove a prior determination should not apply in the present. See In re Application 50642-s40A by Zinne Brothers; In re Application 82956-s76G by Atlantic Richfield Company.

9. Applicant failed to prove unappropriated water is available at the proposed point of diversion during the proposed period of use from mid-September through April. One occurrence of flow is not sufficient proof that water is sufficiently available to satisfy a new appropriation, especially if the one occurrence was outside the operational plan described by Applicant. See Findings of Fact 8 and 12. Such a single occurrence cannot be the basis for a finding that unappropriated water is reasonably available during the proposed period of use. See In re Application 68033-s76G by Robert Hollenback; In re Application 77304-s40C by Dave and Patricia A. Roberts. Furthermore, the measurement was taken during the period from early May through mid-September when natural flows are being augmented and there is no unappropriated water in the source. See Findings of Fact 7, 9, 10, and 11, and Conclusion of Law 7. The record contains no evidence with which to determine whether water is available from

mid-September through April. There being nothing in the record that shows unappropriated water is reasonably available in the source at the proposed point of diversion during the proposed period of appropriation, it is concluded that the criterion set forth in Mont. Code Ann. § 85-2-311(1)(a) (1991) is not met.

10. Since Applicant is required to show by substantial credible evidence all the criteria necessary for the issuance of a permit have been met, and since Applicant has failed to demonstrate there are unappropriated waters in the source of supply at the proposed point of diversion, no finding is necessary as to whether the water rights of prior appropriators would be adversely affected, whether the proposed means of diversion and operation of the appropriation works are adequate, whether the proposed use is beneficial, whether the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved, or whether Applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See In re Application 53221-s400 by John E. and Betty J. Carney; In re Application 61333-s40A by Reuben C. Pitsch; In re Application 77335-s40A by Reuben C. Pitsch.

PROPOSED ORDER

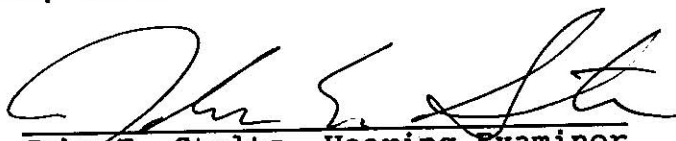
Application for Beneficial Water Use Permit 80175-s76H by Steve Tintzman is denied.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exceptions and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 20th day of April, 1993.


John E. Stults, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East Sixth Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 20th day of April, 1993, as follows:

Steve Tintzman
386 Cooper Ln
Hamilton, MT 59840

Bruce & Joan Chesebro
874 Willow Creek Rd
Corvallis, MT 59828


Ronald T. Conklin
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